(16)

No. 04-967

In The

Supreme Court of the United States

October Term 2004

NORMA McCORVEY,
FORMERLY KNOWN AS JANE ROE,
Petitioner,

v.

BILL HILL, Dallas County District Attorney,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONER With Appendix

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BRIEF OF AMICUS CURIAE LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

Amicus Curiae[1] has a substantial interest in the disposition of this case. Life Legal Defense Foundation, (LLDF) is a California not-for-profit corporation, founded in 1989 for the purpose of defending the rights of the unborn and their advocates, particularly by providing them with a trained and committed voice in the courtrooms of our Nation. LLDF has created a network of hundreds of volunteer attorneys and laymen across the country for that purpose.

LLDF is committed to the defense of the unborn. This case provides the Court with an opportunity to review its analysis and approach to the issue of abortion in a landscape totally different than when it first decided the case of *Roe v. Wade,* in 1973. There is new legislation called Safe Haven laws, which provides a viable alternative to women who can now abandon their baby without criminal prosecution. There are laws protecting a baby born alive after an abortion. There is scientific technology providing 3-D images detailing the development of an unborn child that was not available to this Court in 1973.

The Nation awaits this Court's review of this controversial issue based upon the current landscape. The LLDF urges this Court to review its decision in light of a new day.

SUMMARY OF REASONS FOR GRANTING CERITIORARI

1. This Court should grant certiorari, as Texas did not repeal its abortion ban by implication.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* state that the brief was prepared in its entirety by *amicus curiae* and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any other person other than *amicus curiae*, its members, and its counsel.

Abortion regulations by themselves do not automatically repeal abortion bans. This Court should look to the type of regulations themselves to determine if they are irreconcilable with the State's prior abortion ban. The regulations in Texas are not. Rather, these regulations are in line with the position of Texas prior to this Court's decision in *Roe v. Wade*. This case is not moot.

2. The legal and factual landscape concerning abortion has changed. Since 1973, forty-six (46) states have enacted Safe Haven laws to provide a different approach to an unwanted pregnancy. Now, women may safely abandon their baby and the state will assume the burden of rearing the child. Other states have enacted Born Alive legislation protecting babies who survive the abortion procedure. Technology has advanced greatly, providing a 3-D view into the development of the unborn. This Court now has before it a landscape unimaginable 32 years ago. It is time for this Court to address these changes.

REASONS FOR GRANTING CERITIORARI

I.

TEXAS DID NOT REPEAL ITS ABORTION BAN BY IMPLICATION. THEREFORE, THIS CASE IS NOT MOOT.

The Fifth Circuit in *McCorvey v. Hill*, 385 F.3d 846, (5th Cir. 2004), *petition for cert. filed*, 2005 WL 123452, (No. 04-967), in reviewing the mootness doctrine cited the following, "[s]uits regarding the constitutionality of statutes become moot once the statute is repealed."[2] *See page 4 of Opinion.* The critical question is whether Texas has in fact repealed its statutes banning abortion. Clearly, the Fifth Circuit in *McCorvey*, believed Texas had done so by implication.

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[2] *Id.* at page 4.

The Fifth Circuit in *McCorvey* used the fact that Texas has regulated abortion since this Court's decision in *Roe*[3] to support its position that Texas had repealed its abortion ban by implication. Amicus submit that the fact a state regulates abortion does not necessary mean it has repealed its abortion ban. Rather, the issue should be analyzed under the framework of whether its regulations are irreconcilable with its prior abortion ban. Regulations that are restrictions on abortion are not irreconcilable with a prior ban on abortions. Such is the case with Texas. The regulations cited to by the Fifth Circuit involve restricting minors access to abortion, regulating the licensing of abortion clinics, and restricting government funding of abortions. These regulations are not irreconcilable with Texas' dormant ban on abortion unless necessary to safe the life of the mother.

This distinction in analysis of post-*Roe* regulations is addressed in the article *What If Roe Fell? The State-by-State Consequences of Overturning Roe v. Wade.*[4] In her analysis, the author gives the following example:

However, this determination is often not so clear-cut. For example, many states have enacted restrictions on abortions that are permitted in the state—such as a requirement that woman wait 24 hours after receiving certain state-scripted and biased information before obtaining an abortion rather than passing a statute affirmatively setting for the conditions under which abortions are permitted. In this situation, a court could decide that these later-enacted statues were not irreconcilable with an earlier ban statute by interpreting the mandatory delay/biased counseling law as a regulation on the few abortions that might be allowed under the ban statute. For example, if the

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[3] *Roe v. Wade*, 410 U.S. 113 (1973).

[4] Center for Reproductive Rights, September 2004, pg 9, *at* www.reproductiverights.org (last visited Jan. 27, 2005).

ban allowed abortions to save the woman's life, the court could interpret the mandatory delay law as regulating those few abortions performed to save the woman's life, not as an indication that additional abortions were allowed. Under this reasoning, an abortion ban would not be viewed as irreconcilable, and therefore might be considered enforceable. (internal quotation omitted)

Amicus submits that the Texas regulations fall in line with this example and should be interpreted as such by this Court.

Contrast this approach with the position taken in Oregon. The Oregon Supreme Court in *State of Oregon v. Clowes*, 310 Or. 686, 801 P.2d 789, 796 (1990) reviewed the status of Oregon's abortion law:

The Oregon legislature made a deliberate value decision when, in 1983, as previously discussed, it repealed the Oregon statutes that restricted a woman's right to terminate her pregnancy and enacted law that assumes abortions will be performed.

If this had been the state of affairs in Texas concerning its abortion laws, the position of the Fifth Circuit would be without fault. Unfortunately, it was not. Rather, the Fifth Circuit's position that since Texas regulates the availability and conditions for abortion it repealed its ban by implication, is too expansive an interpretation to support the application of the mootness doctrine, especially with an issue of nationwide importance.

II.

THE MAGNITUDE OF PUBLIC POLICY AT ISSUE HERE REACHES NATIONWIDE. SAFE HAVEN LAWS A/K/A BABY MOSES LAWS ARE NOW STATUTORY IN FORTY-SIX (46) STATES, THUS RELIEVING WOMEN OF THE BURDEN OF CHILD REARING AND PROTECTING THE STATE'S INTEREST IN LIFE.

Consider the story of Veronica.[5] Veronica was a young single woman, age 22, uncommitted, and ready to embark on a new life as she left her hometown searching for success. Would she return to college for a degree? Would she begin a new career? She had everything going for her...everything except a pregnancy by the man she left behind. What was Veronica to do?

She turned to a local woman's clinic for guidance. There she was told that she had no other choice but to "take care of the problem" as she was unemployed, young, single, and not ready for the burden that raising a child would put on her life. Was the counselor right? Could she handle the burden of this child? She never considered abortion in the past. However, if she chose adoption, would the child one day locate and confront her? What other choice did Veronica have?

Today, Veronica, and women just like her throughout the United States do have another alternative. Women now have the option of avoiding the abortion procedure and the harms that go along with it, leave behind the fear that an adopted child may later confront them without being forced to bear the burden of caring for an "unwanted" child.

Beginning in the year 2000, Texas enacted a new body of law that has been described as a Safe Haven or "Baby Moses" law.[6] This law allows a woman to safely abandon her child at a specified location without fear of prosecution. The State itself chose to take on the responsibility of caring for and locating a loving home for the child.

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[5] The woman described in this story has chosen to remain confidential. As such, her name been changed to "Veronica" in an effort to protect her identity.

[6] "Led by Texas State Representative Geanie W. Morrison, the Safe Haven legislation was proposed to address two important issues. First, it was proposed to significantly reduce the risk of a newborn being abandoned in a dangerous environment that may result in death. Second, the legislation was proposed to protect mothers who feel as if they have no other option besides abandonment, but

Soon after, other states began considering the issue of how to promote life and provide an avenue for a pregnant woman to deliver her baby, yet not be required to bear the burden of raising the child. To date, forty-six (46) states [7], comprising 92% of the states across the Nation, have crafted some form of these laws and are willing to completely relieve women of the burden of caring for an "unwanted" child. [8] The result of such legislation is twofold, the woman is not burdened with unwanted childrearing and the child is provided for. Counsel for Amicus has reviewed each of these statutes. A brief summary of the approach taken by these statutes follows.

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who might be willing to safely deliver their newborn to a safe haven." Dayna R. Cooper, *Fathers Are Parents Too: Challenging Safe Haven Laws With Procedural Due Process* 31 Hofstra L. Rev. 877, 879, Spring (2003).

[7] *See* ALA. CODE § 26-25-1 *et seq.* (2000); ARIZ. REV. STAT. § 13-3623.01 (2001); ARK. CODE ANN. § 9-34-202 (Michie 2001); CAL. HEALTH & SAFETY CODE § 1255.7 (Deering 2000); COLO. REV. STAT. § 19-3-304.5 (2000); CONN. GEN. STAT. § 17a-57 *et seq.* (2000); DEL. CODE ANN. tit. 16 § 907A (2001); FLA. STAT. ANN. § 383.50 *et seq.* (West 2000); GA. CODE ANN. § 19-10A-1 *et seq.* (2002); IDAHO CODE § 39-8201 *et seq.* (2001); § 383.50 ILL. COMP. STAT. 2/1 *et seq.* (West 2001); IND. CODE Ann. § 31-34-2.5-1 *et seq.* (Michie 2000); IOWA CODE § 233.1 *et seq.* (2001); KAN. STAT. ANN. § 38-15,100 (2000); KY. REV. STAT. ANN. § 405.075 (Michie 2002); LA. CH. CODE art. 1701 *et seq.* (West 2000); ME. REV. STAT. ANN. tit. 17-A § 553 (West 2002); MD. CODE ANN. CTS. & JUD. PROC. § 5-641 (2002); MASS. GEN. LAWS ch. 119, § 391/2 (2004); MICH. COMP. LAWS § 750.135 (2000); MINN. STAT. § 145.902 (2000); MISS. CODE ANN. § 43-15-201 *et seq.* (2001); MO. REV. STAT. § 210.950 (2002); MONT. CODE ANN. § 40-6-401 *et seq.* (2001) ; NEV. REV. STAT. ANN. § 432B (2001); N.H. REV. STAT. ANN. § 132-A *et seq.* (2003); N.J. STAT. ANN. § 30:4C-15.5 *et seq.* (West 2000); N.M. STAT. ANN. §§ 24-22-2 et seq. and 30-6-1 (Michie 2001); N.Y. PENAL § 260.03; PENAL § 260.15; and, SOC. SERV. § 372-g (2000) ; N.C. GEN. STAT. § 7B-500 (2001); N.D. CENT. CODE § 50-25.1-15 (2001); OHIO REV. CODE ANN. § 2151.3515 *et seq.* (Anderson 2001); OKLA. STAT. tit. 10 § 7115.1 (2001); OR. REV.

In general, there are two basic approaches taken by the individual states as they consider the issue of child abandonment. The first approach started by Texas and followed by Alabama, Arizona, Arkansas, Delaware, Indiana, Michigan, Mississippi, Missouri, New Jersey, New York, Oregon, Utah, and West Virginia, is to provide for an affirmative defense for any potential charges for child abandonment. If the child is unharmed, then the mother can use this defense. The majority of the remaining states provide for immunity from any charges for child abandonment. The latter approach provides for greater anonymity, as the mother does not have to fear having to publicly defend herself against criminal charges at some later date. Many of these states confirm that this is their purpose in their enacting legislature.[9]

STAT. § 418.017 (2001); PA. STAT. ANN. tit. 23 § 6501 *et seq.* (West 2002); R.I. GEN. LAWS § 23-13.1-1 *et seq.* (2001); S.C. CODE ANN. § 20-7-85 (Law. Co-op. 2000); S.D. CODIFIED LAWS § 25-5A-27 *et seq.* (Michie 2001); TENN. CODE ANN. § 68-11-255 (2001); TEX. FAM. CODE ANN. § 262.301 *et seq.* (West 1999); UTAH CODE ANN. § 62A-4a-801 *et seq.* (2001); VA. CODE. ANN. § 18.2-371.1 (Michie 2003); WASH. REV. CODE § 13.34.360 (2002); W. VA. CODE § 49-6E-1 *et seq.* (2000); WIS. STAT. ANN. § 48.195 (West 2001); WYO. STAT. ANN. § 14-11-101 *et seq.* (Michie 2003).

[8] Many states allow different time periods in which a woman is able to safely abandon the child without fear of prosecution. For example in Texas, the woman is given sixty (60) days to leave the child at a safe location without questions asked; in Florida, the time period is shortened to 3 days. The state of North Dakota provides for the longest period of one year during which a mother may safely abandon her baby. North Dakota also provides for immunity for such action.

[9] *See, e.g.*, Louisiana Statutes La. Ch. C. art. 1149 "The purpose of this Chapter is to provide a mechanism whereby any parent may relinquish the care of an infant to the state in safety, anonymity, and without fear or prosecution."

In 2001, the Oregon legislature followed in Texas' footsteps by enacting legislation to allow a parent to anonymously leave an infant at an authorized facility.[10] In fact, legislative history to this bill recognized Texas as the pioneer in this area. Testimony was presented that California followed Texas in 2000.[11] Testimony was also presented that Oregon's bill was even more comprehensive than California's. Oregon added more locations as drop-off points such as police and fire stations.[12] Senator Peter Courtney, Vice-Chair of the committee reviewing Oregon's proposed bill testified that the purpose of this bill was to provide a means to those mothers or fathers who do not want their baby, who have hidden or denied the pregnancy or who cannot bear the shame or struggle a baby would impose.[13] Further testimony provided by Dr. Grant Higginson, Acting Administrator, Health Division, Oregon Department of Human Services stated succinctly the State's interest in saving one child would be considered a "true success."[14] A website for reviewing the legislative history of Oregon's Baby Moses law is provided below.[15]

Oregon and the majority of the remaining states have accepted the burden associated with raising a child. Unfortunately, this change did not begin until 2000. Clearly, this is a significant change in the legal landscape since 1973, and is relevant to Petitioner's Rule 60 motion. The Court in *Roe v. Wade* expressed

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[10] *See* OR. REV. STAT. § 418.017 (2001), Appendix, page A1.

[11] *See* Testimony of Debbie Ferris, Garden of Angels, Safe Arms for Newborns, Senate Committee on Judiciary, March 1, 2001, Tape 49 A, SB 199.

[12] *See* Testimony of Vice-Chair Senator Peter Courtney, Senate Committee on Judiciary, March 1, 2001, Tape 49 A, SB 199.

[13] *Id.*

[14] *See* Testimony of Dr. Grant Higginson, Senate Committee on Judiciary, March 1, 2001, Tape 50 A, SB 199.

[15] http://arcweb.sos.state.or.us/legislative/legislativeminutes/01legisweb/s/jud/SJUD03~1.htm.

its concern for the burden placed upon women if abortion was not available.

Maternity, or additional off-spring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable psychologically and otherwise, to care for it.[16]

In 1973, the Supreme Court could not envision that the states would take the responsibility of the care of the child without repercussions on the woman. Now, in forty-six states, a pregnant woman can leave her infant at various locations such as a physician's office, hospital, fire station, sheriff's office or police station. The family unit is not forced to deal with an "unwanted child." Rather, the state will accept this burden. The parent cannot be convicted of child abandonment as long as abuse is not involved.[17]

III.

THE STATE'S PUBLIC POLICY IN PROTECTING LIFE IS EXPRESSED THROUGH ITS SAFE HAVEN LAWS

This Court in *Roe* recognized the state's competing interest in potential life. It stated:

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[16] *Roe*, *supra* at 153.

[17] OR. REV. STAT. § 163.535, Abandonment of a child, is an example of such language.

(3) It is an affirmative defense to a charge of violating subsection (1) of this section that the child was left in accordance with ORS 418.017.

> As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.[18]

Later in the same opinion, this Court defined when the state's interest becomes compelling.

> "With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[19]

A significant change in the last five years is that forty-six states have established the policy of providing life for unwanted babies and relieving the mother of the shame associated with abandoning their child.[20]

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[18] *Roe, supra,* at 154.

[19] *Roe, supra,* 163-64.

[20] "Indiana has an interest in protecting its children. The mother abandoning her child with an emergency medical services provider does so because she feels that abandoning the child is in the best interest of the child. The interest in the welfare of children, shared by the state and the mother who chooses to leave her baby with an emergency medical services provider, can be furthered without punishing the mother for the abandonment." Jill M. Acklin, *Choosing Life: Proposing Immunity for Mothers Who Abandon Their Newborns,* 35 Ind. L. Rev. 569, 590 (2002)

Examples of how the different states addressed this public policy can be found in many of the enacting statutes. The State of Illinois for example stated in its Abandoned Newborn Infant Protection Act:[21]

It is recognized that establishing an adoption plan is preferable to relinquishing a child using the procedures outlined in this Act, but to reduce the chance of injury to a newborn infant, this Act provides a safer alternative.

A public information campaign on this delicate issue shall be implemented to encourage parents considering abandonment of their newborn child to relinquish the child under the procedures outlined in this Act, to choose a traditional adoption plan, or to parent a child themselves rather than place the newborn infant in harm's way.

The state of Delaware stated its public policy this way[22]:

> "(a) The General Assembly finds and declares that the abandonment of a baby is an irresponsible act by parent(s) and places the baby at risk of injury or death from exposure, actions by other individuals, and harm from animals. However, the General Assembly does recognize that delivering a live baby to a safe place is far preferable to a baby killed or abandoned by the parent(s)."

As part of their education outreach on this issue, public health programs in the various states create brochures and posters providing information on their Safe Haven laws. California for example includes the following language in their public posters, "Safely Surrendered Baby, no shame, no blame, no names."[23]

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[21] § 325 ILCS 2/5.015 S13.

[22] 16 Del. C. § 907A.

[23] *See* http://www.dss.cahwnet.gov/cdssweb/SafelySurr_91st.htm (last visited Jan. 27, 2005).

The state's interest in protecting life is established to a greater degree in the State of Michigan. Not only does the State of Michigan provide a safe haven for unwanted babies, it also protects the lives of newborns who survive an abortion procedure. Entitled the "Born Alive Infant Protection Act" the State establishes its public policy in this area as follows:[24]

AN ACT to assert the state's interest in protecting all individuals; and to prescribe responsibilities and procedures in regard to a newborn whose live birth results from an abortion.

The State of Michigan solidifies its public policy with the following legislative findings:[25]

Sec. 2. The legislature finds all of the following:

The state has a paramount interest in protecting all individuals.

If an abortion results in the live birth of a newborn, the newborn is a legal person for all purposes under the law.

A woman's right to terminate pregnancy ends when the pregnancy is terminated. It is not an infringement on a woman's right to terminate her pregnancy for the state to assert its interest in protecting a newborn whose live birth occurs as the result of an abortion.

Forty-six states have chosen to adopt laws reflecting the public policy of life. These states have enacted laws to provide an alternative approach to an unwanted pregnancy. This approach was unheard of in 1973, and dramatically changes the factual and legal landscape upon which *Roe v. Wade* currently rests. The legal and social landscape has changed. It is time for this Court to review *Roe v. Wade* in light of these changed factual and legal conditions.

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[24] MCLS prec § 333.1071.

[25] MCLS § 333.1072.

A. SAFE HAVEN LAWS ARE SUCCESSFUL ACROSS THE NATION.

Texas' safe haven law and similar legislation across our Nation are being utilized successfully. Thus, many women are now exercising the option of anonymously relieving themselves of the childrearing burden while simultaneously providing for the safety of the child. Statistics in this regard are difficult to obtain as a woman who chooses to abandon a child under the protection of safe haven laws may remain anonymous. However, in an effort to demonstrate to this Court the success of Safe Haven laws, the following summary is provided.

Statistics from only 33 of the 46 of the states with Safe Haven legislation in place reflect that 295 infants have been safely abandoned within those states over the past 5 years.[26] The National Council for Adoption reports:

> "[a]fter initial presentation of these newborns at Safe Havens, approximately one third were placed for adoption by parents through the usual process; one third remained Safe Haven babies and were placed for adoption, with the parents maintaining their anonymity as allowed under the law; and one third were reunited with their parents who changed their mind and decided to parent."[27]

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[26] National Council for Adoption, *Kids at Heart: Popeye to Adopt Swee'Pea During National Adoption Month*, National Adoption Report, page 5, Fall 2004, *available at* www.ncfa-usa.org/pub_NAR.htm (last visited Jan. 9, 2005). The National Council for Adoption supports Safe Haven legislation "...so desperate mothers can place their children safely and legally with authorized caregivers rather than abandoning them or worse." *See* www.ncfa-usa.org/about_Mission.htm (last visited Jan. 9, 2005).

[27] *Id.*

In Florida alone, twenty-two (22) newborn children have been safely abandoned since the enactment of the State's Safe Haven law 2000.[28] One of the twenty-two was a baby boy, just a few hours old, who was left in an emergency room.[29] As there was no evidence of abuse, the mother was not pursued by the State for abandonment.[30] The child was placed into the state foster care system and made available for adoption.[31]

Another baby boy was abandoned under Florida's Safe Haven law on April 6, 2003. A woman and her father safely delivered a newborn wrapped in a kitchen towel to at a fire station.[32] The child was healthy and without signs of abuse.[33] He was later placed with an agency for the purpose of adoption.[34]

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[28] Telephone interview with Anna Aeschleman, Director of The Gloria M. Silverio Foundation, a/k/a A Safe Haven for Newborns (Dec. 31, 2004).

[29] Palataka Daily News, at www.safehavenfornewborns.com/palatka.html (last visited Jan. 27, 2005).

[30] *See* Section 383.50(5), Fla. Stat. (West 2000), which provides that when a woman utilizes the State's Safe Haven law "[e]xcept where there is actual or suspected child abuse or neglect, any parent who leaves a newborn infant with a firefighter or emergency medical technician at a fire station or brings a newborn infant to an emergency room of a hospital and expressed an intent to leave the newborn infant and not return has the absolute right to remain anonymous and to leave at any time and may not be pursued or followed unless the parent seeks to reclaim the newborn infant."

See also Section 383.50(10), Fla. Stat. (West 2000) providing that "[a] criminal investigation shall not be initiated solely because a newborn infant is left at a hospital under this section unless there is actual or suspected child abuse or neglect."

[31] Palataka, *supra*.

[32] Sarasota Herald Tribune, Nameless visitors drop off newborn, Section B, Page BMI, April 6, 2003, *available at* www.safehavenfornewborns.com/Sarasota%20Herald.html (last visited Dec. 22, 2005).

[33] *Id.*

[34] *Id.*

In Louisiana, the Crisis Pregnancy Health Center of Slidell, Inc. received a telephone call from Anne.[35] Anne had given birth and did not want to keep the baby.[36] She knew of the State's Safe Haven law and had intended on utilizing it rather than abortion.[37] The child was a healthy baby girl, just two hours old, who was later brought to a hospital and turned over to Louisiana social services.[38] Within 72 hours "Claudia" was placed with foster parents who later adopted her.[39]

IV.

SAFE HAVEN A/K/A BABY MOSES LEGISLATION CREATES A SIGNIFICANT CHANGE IN THE SOCIAL AND LEGAL ATMOSPHERE THROUGHOUT THE UNITED STATES.[40]

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[35] "Anne" was the name provided to the Center by the mother of the newborn. Her complete name remains unknown as Anne chose to anonymously and safely abandon her child in May, 2004.

[36] Interview with Cynthia Collins of the Crisis Pregnancy Health Center of Slidell, Inc., in Washington D.C. (Jan. 1, 2005).

[37] *Id.*

[38] *Id.*

[39] *Id.* The infant was named Claudia and is currently eight months old.

[40] *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), *cert. filed* Docket No. 04-967

When this Court was presented with, and later decided *Roe*, Safe Haven laws were not in existence.[41] Safe Haven laws were created post-*Roe* for the purpose of protecting newborns from harm. The purpose of this body of legislation does not lessen its application to the matter currently at issue, however. Rather, the laws are directly applicable as they create an option for a woman that was not available in 1973. Thus, the mere existence of these laws in nearly every state throughout our country creates a significant change in both the legal and social atmosphere from when the Court originally heard *Roe*. Therefore, it is time for this Court to reconsider the impact that the decision in *Roe* has across the Nation.

A. LEGAL CHANGE: ABORTION WAS LEGALIZED WHILE ABANDONMENT WAS CRIMINALIZED

In 1973, a woman was not provided with immunity from criminal prosecution for the act of anonymously abandoning her child. Rather, immunity to criminal charges began in 2000 with the enactment of Texas' Safe Haven law and subsequently followed in forty-five other states across the Nation.[42] Further, in 1973 abortion was legalized via this Court's ruling in *Roe*. Essentially, abortion was legalized while abandonment was criminalized. With this in mind, it was more favorable during the time period from 1973 through 2000 for a woman to abort an unwanted child rather than carry it to term, give birth, and safely abandon the child.

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[41] *Doe v. Bolton*, 410 U.S. 179 (1973).

[42] As discussed above, several states provide women with an affirmative defense to prosecution, while others provide complete immunity.

Since 2000, a shift occurred that transferred the "burden" of an unwanted child from the woman to the state. This shift has been taken on by the states voluntarily through the enactment of Safe Haven laws. [43] Presently, the woman simply needs to present her child to the proper authorities and the state will bear the costs of childcare and the burden of child rearing until the child is legally adopted.

Therefore, women can now anonymously abandon their young children without fear of prosecution as abandonment without abuse has essentially been legalized.[44] Accordingly, since abandonment without abuse is no longer criminalized as it was in 1973, the Court should reassess the assumptions in *Roe* regarding abortion being necessary to avoid the burden of "unwanted" children.

B. SOCIAL CHANGE: THE FEARS AND STIGMAS RELATED TO UNWANTED PREGNANCIES HAVE BEEN RELIEVED.

At the time *Roe* was decided, fears and stigmas related to women faced with an unwanted pregnancy were widespread within our society and were of concern to this Court. In *Doe*, as in *Roe*, we similarly found this Court concerned with the future of a woman who as allegedly faced with an unwanted pregnancy.[45]

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[43] Seventy-seven members of the U. S. House of Representatives presented a bill to the entire House that would have provided funding to state safe haven programs. In summary, the Act would have amended Temporary Assistance for Needy Families of Title IV of the Social Security Act to allow the states to apply for funding for their safe haven program. See H.R. 2018, 107th Congress, 1st Session, Safe Havens Support Act. This Bill was referred to the House subcommittee on Education Reform on July 25, 2001.

[44] An exception is found within many/the statutes for abuse. *See* ALA. CODE, et al., *supra*.

[45] *Doe v. Bolton*, 410 U.S. 179 (1973), It was alleged that *Doe* was abandoned by her husband, unable to care for other children of her own, impoverished and would have been "unable to care for or support the new child," *Id.* at 185.

As two Justices of this Court realized, "[a]t the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons – convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc."[46]

In analyzing the Georgia abortion statute, this Court reasoned that:

> Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required...to abandon educational plans; to sustain loss of income; to forgo the satisfaction of careers; to tax further mental and physical health in providing child care; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.[47]

These fears and stigmas have since been relieved through the combination of the enactment of Safe Haven laws across the Nation and a deeper awareness by our culture. The life and future of a woman no longer needs to be distressed by the burden of additional offspring. Now, educational plans may be pursued, income may be maintained, and careers can be sought by women who give birth and safely and anonymously abandon their babies. The taxing of a woman's mental and physical health due to child care is now irrelevant as she no longer needs to provide the care. Any distress associated with the unwanted child is calmed by

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"That opinion [*Doe v. Bolton*] and this one, are to be read together." *Roe, supra* at 165, citing *Doe*.

[46] *Doe, supra* at 222 (White, J., dissenting).

[47] *Id.* at 215-16.

the knowledge that the woman can choose to safely abandon the child without fear of prosecution. The problem of an unable family is resolved, as the states are able when the families are not. These significant changes in the social conditions surrounding pregnancy merit reassessment of *Roe*.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

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RESPECTFULLY SUBMITTED,

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APPENDIX

OR. REV. STAT. § 418.017 (2001):

(1) A parent may leave an infant at an authorized facility in the physical custody of an agent, employee, doctor or other medical professional working at the authorized facility if the infant:

(a) Is 30 days of age or younger as determined to a reasonable degree of medical certainty; and

(b) Has no evidence of abuse.

(2) A parent leaving an infant under this section is not required to provide any identifying information about the infant or the parent.

(3) An employee, agent, doctor or other medical professional working at an authorized facility shall receive an infant brought to the authorized facility under this section.

(4) If acting in good faith in receiving an infant, an authorized facility receiving an infant under this section and any agent, employee, doctor or other medical professional working at the authorized facility are immune from any criminal or civil liability that otherwise might result from their actions relating to receiving the infant. A city, county or other political subdivision of this state that operates a sheriff's office, police station or fire station that receives an infant under this section is immune from any criminal or civil liability that otherwise might result from the actions taken by its employees or agents in receiving the infant.

(5) When an infant has been left at an authorized facility as provided in this section:

(a) The authorized facility shall notify the Department of Human Services that an infant has been left at the facility as provided in subsection (1) of this section no later than 24 hours after receiving the infant.

(b) The infant is deemed abandoned for purposes of ORS 419B.100, and the department is

deemed to have protective custody of the infant under ORS 419B.150 from the moment the infant was left at the facility. The department shall comply with the applicable provisions of ORS chapter 419B with regard to the infant. (6) The authorized facility shall release the infant to the department when release is appropriate considering the infant's medical condition and shall provide the department with all information the facility has regarding the infant.

(7) As used in this section:

(a) "Abuse" has the meaning given that term in ORS 419B.005.

(b) "Authorized facility" means a hospital as described in ORS 442.015, freestanding birthing center as defined in ORS 442.015, physician's office, sheriff's office, police station or fire station.

(c) "Physician" means a person licensed by the Board of Medical Examiners for the State of Oregon to practice medicine and surgery.